In the High Court of Judicature at Madras

Dated: 20/10/2004

Coram

The Honourable Mr.Justice V.KANAGARAJ

Writ Petition No.4084 of 2001

Kannaiyan .. Petitioner

-Vs-

1. The State of Tamilnadu
rep.by its Secretary
Adi Dravidar and Triba l Welfare
Department Fort St.George Chennai.9.

2. The Tamil Nadu Adi Dravidar
Housing & Development Corporation Ltd.
Rep. By its Managing
Director Tamil Nadu Housing Board Complex Anna Nagar Western
Extension Chennai.101

3. The District Adi-Dravidar
and Tribal Welfare Officer
Collectorate
Erode 638 011 .. Respondents.

Prayer: Writ petition filed under Article 226 of the
Constitution of India for the issue of a writ of Certiorari as stated therein.

For petitioner : Mr.T.Murugamanickam

For respondents : Ms.Velumani AGP

:O R D E R

Writ Petition filed by the petitioner praying to issue a Writ
of Certiorari by calling for records relating to G.O.Ms.No.132 Adi-Dravidar
and Tribal Welfare (ADW5) Department dated 15.07.1997 on the file of the first
respondent and quash the same so far as the petitioner is concerned.

2. Challenging the Government Order made in G.O.Ms.NO.132 Adi-Dravidar and Tribal Welfare (ADW 5) Department dated 15.07.1997, wherein the first respondent has ordered that for all building works to be taken up by the Tamil Nadu Adi-Dravidar Housing and Development, the second respondent herein, that such works would be entrusted only to the contractors who belong to Adi-Dravidar or Tribals only, excluding all other contractors who do not belong to the categories mentioned above.

3. In the affidavit filed in support of the above writ petition, the petitioner would submit that he would belong to Boyar community and is a registered contractor with the Government Departments; that all contracts relating to the construction works for Adi-Dravidars and Tribals was made open to contractors of all classes, irrespective of caste or creed; that however, on 12.02.2001, the third respondent herein while inviting tenders for the construction of housing colonies for Tribals in Sangarapalayam Village, Bhavani Taluk, has imposed a condition that tenders would be invited from contractors who are either Adi Dravidar or Tribals only; that the petitioner has undertaken the works in respect of Adi-Dravidar and Tribal Welfare Schemes and successfully completed the said works and hence he approached the third respondent seeking the reason for the exclusion of regular contractors; however, the third respondent has clearly spelt out that the tender was open only to contractors who are either Adi Dravidar or Tribals, and persons who do not belong to such category were not eligible to make any offer; that as per G.O.Ms.No.132, Adi- Dravidar and Tribal Welfare (ADW5) Department dated 15-07-1997, the tender was open only to contractors who are either Adi P Dravidar or Tribals, and hence the petitioner's offer was rejected. Challenging the said Government Order, the petitioner has come forward with the above writ petition.

4. Heard learned counsel appearing on behalf of the petitioner as well as the learned Additional Government Pleader appearing on behalf of the respondents.

5. During arguments, learned counsel appearing on behalf of the petitioner would submit that he is challenging the impugned G.O.Ms.No.AdiDravidar and Tribal Welfare (ADW5) Department dated 15-07-1997 on two grounds, the first one is that the Government cannot enforce the provisions of the impuged Government Order in the light of the overriding provisions of the Tamil Nadu Transparency in Tenders Act, 1998 which provides that no tender shall be invited or accepted by any authority after the commencement of this Act, except in accordance with the procedure specified in this Act and Rules made thereunder; and further, the Government cannot discriminate between the contractors of the exclusive class; learned counsel would further submit that no valid reason is set out in the impugned Government order as to how the Adi Dravidar and Tribal contractors can be treated as a separate class, merely on account of their caste; that when the same work which has been all along done by contractors belonging to all classes and communities to the complete satisfaction of the authorities, the reasons for categorising the Adi Dravidar and Tribal Contractors as a special class has no nexus with the object sought to be achieved by the impuged order; that it is settled law that no discrimination can be made on

the ground of caste or creed; and more so, the Government order does not come within the reasonable restrictions imposed by Article 19(6) of the Constitution of India; that till 2000, the respondents were awarding contracts to all contractors without implementing the impugned Government Order; that it is only with the recent calling of tender from 12.02.2001, the third respondent seeks to implement the impugned order thereby creating a discrimination; and hence the implementation of the impugned Government Order after such a lapse of four years or so, it causes hardship to the contractors who have been regularly executing such contracts; further he would submit that the extend of reservation cannot exceed 50% and the total reservation in favour of particular class of people has been dealt with by the Hon'ble Supreme Court in the Judgment reported in AIR 1979 SUPREME Court, 1628 (Ramana Dayaram Shetty v. The International Airport Authority of India and others) wherein it has been held as follows:

"Today the Government in a welfare State is the regulator and dispenser of special services and provider of a large number of benefits, including jobs contracts, licences, quotas, mineral rights etc. The Government pours forth wealth,money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms,but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Government and local authorities. Licences are required before one can engaged in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largess in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean, growth in the Government largess and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the government cannot give or withhold largess in its

arbitrary discretion or at its sweet will."

6. Learned counsel appearing on behalf of the petitioner would further cited a decision reported in AIR 1969 SUPREME COURT 1081 (Rasbihari Panda etc.v. State of Orissa) and the relevant portion is hereby extracted:

"The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved ie., effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is ex facie arbitrary; it had no direct relation to the object of preventing exploitation of pluckers and growers of Kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade, to the State."

7. On the contrary, the learned Additional Government Pleader would submit that the impugned Government Order has been being passed by the second respondent for the welfare of the Adi Dravidars and Tribals alone and it is not like other departments. The petitioner is a registered contractor with all the departments including Public Works Department and the Public Works Department is a larger contractor when compared with the second respondent, there is no better interest. The impugned Government Order is only for the benefit of the Adi Dravidars and Tribals under the second respondent and not with the other departments.

8. The learned Additional Government Pleader would also submit that drawing the inspiration from the Constitution of India the Government have passed the Government Order taking into consideration the welfare and well being of the downtrodden communities as such Adi-Dravidars and Tribals and in order to give them a helping hand to come on par with others particularly since they are socially and economically backward, for the up-liftment of whom special provisions are made under the Constitution and since any statute is only subject to the constitutional provisions and the Government Order having been passed drawing inspiration and deriving the source from the Constitution of India, issuance of the G.O. on the part of the respondent Government is perfectly alright and it has to be upheld and on such arguments would pray to dismiss the above writ petition.

9. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for the petitioner and the learned Additional Government Pleader contra, what comes to be known is that it is the impugned G.O.Ms.No.132 Adi-Dravidar and Tribal Welfare (ADW5) Department dated 15.07.1997 passed by the first respondent Government which is sought to be quashed since according to the petitioner, he is a registered contractor with the Government Departments that all contracts relating to construction of works for various Government Departments and also for Adi-Dravidars and Tribals were made open to contractors of all classes, irrespective of caste or creed; but pursuant to the Government Order, the

third respondent on 12.0 2.2001 invited tenders for the construction of housing colonies for Tribals in Sangarapalayam Village, Bhavani Taluk either from AdiDravidars or Tribals only and since according to the G.O.Ms.No.132 dated 15.07.1997, the building works to be taken up by the Tamil Nadu AdiDravidar Housing and Development, they would be entrusted only to the contractors who belong to either Adi Dravidars or Tribals in exclusion of all other contractors who do not belong to the categories mentioned above which according to the petitioner is against the Tami Nadu Transparency in Tenders Act, 1998 and that the Adi-Dravidars and Tribals contractors cannot be treated as a separate class merely on account of their caste and there cannot be any discrimination made on the ground of caste, creed etc. and since the Government Order does not fall within the reasonable restrictions imposed by Article 19(6) of the Constitution of India. Further, citing two cases reported in AIR 1979 SUPREME COURT, 1628 and AIR 1969 SUPREME COURT 1081, the petitioner has come forward to seek to quash the above Government Order.

10. On the other hand, on the part of the respondents, learned Additional Government Pleader, would stoutly defend the Government Order arguing to the effect that the Government Order has got all legal validity and that it is not discriminatory nor a class legislation but the classification made in the Government Order falls with the ambit of the constitutional provisions aimed at the up-liftment of the socially and economically backward sections of the society by making special provisions and therefore since being a reasonable classification, there is nothing wrong in passing of the Government Order and therefore, the writ petition would only become liable to be dismissed and would pray for such an order.

11. The G.O.Ms.No.132, AdiDravidar and Tribal Welfare (ADW5) Department dated 15.07.1997, which is the subject matter of the writ petition in hand has provided for the second respondent relating to its building works should be entrusted only to the contractors who only belong to Adi- Dravidars or Tribals. The petitioner does not belong to either of these two communities covered under the Government Order and therefore, taking the plea of discrimination in the eye of law has sought for quashing of the Government Order. The main arguments advanced on the part of the petitioner is that the petitioner being a registered contractor has been so far taking up construction works of all the departments in the first respondent Government including that of the construction works for Adi-Dravidar and Tribals which have been made open to the contractors of all classes which is restricted by the government Order and hence it is discriminatory.

12. In support of the arguments, the petitioner would submit that the provisions of the impugned Government Order cannot be enforced in the light of the overriding provisions of the Tamil Nadu Transparency in Tenders Act, 1998 which provides that no tender shall be invited nor accepted by any authority after the commencment of this act except in accordance with the procedures specified in this Act and Rules, made thereunder. It would further be argued that the reasons for categorising the Adi-Dravidar and Tribal Contractors as a special class has no nexus with the object sought to be achieved by the impugned order that there cannot be any discrimination made on the ground of caste or creed and the Government Order does not come within the

reasonable restriction imposed under Article 19(6) of the Constitution of India.

13. Article 15(4) which was inserted by the Constitution First Amendment Act 1951, may be the answer for most of the doubts raised on the part of the petitioner and therefore, it is necessary to extract Article 15(4) of the Constitution of India.

"Nothing in this Article or in clause (2) of the Article 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and Scheduled Tribes"

This Article 15 (4) not only contains Article 15(1)and (2) but also Article 29(2) as well.

14. The scope and object of this clause is to bring articles 15 and 29 in line with Articles 16 (4), 46 and 340 and to make it constitutional for the State to reserve seats for backward classes of citizens, scheduled castes and Tribes in the public educational institutions as well as to make other special provisions as may be necessary for their advancement. In short, the amendment would validate the reservation and would protect the interests of the scheduled castes and scheduled tribes. Article 15(4) is an exception to Article 15(1) in so far as it forbids discrimination on the ground of race or caste. It is also in the nature of an exception to Article 29(2).

15. No doubt that in general statutory provisions of law have the overriding effect on the Government Orders passed but since this Government Order which is impugned herein has been issued in consonance with the enabling provisions of the Constitution particularly under Article 15(4) of the Constitution of India aimed at the advancement of the socially and economically backward sections of the society as a special provision, the Government Order has been issued by the first respondent State Government and further since the statute cannot override a constitutional right. Though it apparently looks as if the statute has been overridden by the Government Order, if it is seen in the light of Article 15 (4), the Government Order can be given effect to and it cannot be said that the statute is being overridden especially when the fundamental obligation of the State is given effect to for the purpose of giving effect to Article 15(4) of the Constitution of India. Moreover in its recent judgments rendered by the Hon' ble Apex Court reported in 2004 (6) SCC, 36 as settled law to the effect saying that "Constitution right cannot be taken away by a statute notwithstanding anything contained contrary in its sense any other law for the time being in force".

16. Even the judgments cited on the part of the petitioner reported in AIR 1979 SC 1628 & AIR 196 9 SC 1081 it is only held therein either the discretion of the Government is not unlimited,in that the

Government cannot give or withheld the largess in its arbitrary discretion or at its sweet will; that exclusion of all the persons interested in the trade, who were not in the previous year licensees is ex facie arbitrary and these judgments have not at all discredited or held that no welfare legislation could be made or order passed by the State Government particularly having its source under Article 15(4) of the Constitution of India towards up-liftment or advancement of the socially and economically backward sections of the society making special provisions for them and therefore, it could very well be concluded that the Government Order impugned is not class legislation which the constitution forbids but a reasonable classification which the Constitution of India promotes and therefore this Court is not able to see any inconsistency or illegality or even arbitrary exercise of power by the first respondent government in passing the impugned Government Order and since within the parameters of their relevant provisions of the Constitution of India as afore-mentioned the impugned Government Order issued by the first respondent Government has to be held valid and proper and hence the following order.

In result,
(i) the above writ petition does not merit acceptance but only becomes liable to be dismissed and the same is dismissed accordingly

in the circumstances of the case, there shall be no order as to costs.

Index : Yes
Internet : Yes
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To

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